No. 80-949

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MICHAEL MOTORS, INC.,

Petitioner,

vs.

COLORADO DEALER LICENSING BOARD, STATE OF COLORADO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the facts of this case was petitioner denied access to the civil courts of the State of Colorado, contrary to the fourteenth amendment of the United States Constitution, justifying federal judiciary intervention in the decision of the Supreme Court of the State of Colorado?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth by petitioner, the following Colorado statutes are involved:

a. C.R.S. 1973, 12-6-104(3)(e) which reads:

(3) The board is authorized and empowered:

. . . .

(e) After due notice and hearing, to revoke and suspend, on such terms and conditions and for such period of time as to the board shall appear fair and just, any motor vehicle dealer's, wholesaler's, motor vehicle salesman's, or used motor vehicle dealer's license. . . .

b. C.R.S. 1973, 24-4-106(8) which reads as follows:

(8) Upon a showing of irreparable injury, any court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency. If the court finds that any proceeding contesting the jurisdiction or authority of the agency is frivolous or brought for the purpose of delay, it shall assess against the plaintiff in such proceeding costs and a reasonable sum for attorneys' fees (or an equivalent sum in lieu thereof) incurred by other parties, including the state.

STATEMENT OF THE CASE

Pursuant to C.R.S. 1973, 12-6-104(3)(e), the Colorado Dealer Licensing Board, herein referred to as board or respondent, ordered petitioner, Michael Motors, Inc., a licensed used motor vehicle dealer, to appear before the

board to answer an allegation that, on or about October 7, 1978, petitioner did, itself or by and through its agents and/or employees, intentionally fail to perform a written agreement entered into in its behalf by its manager and agent, B.H. Denholm, with one Alfred Maldonado, in which Maldonado contracted with petitioner to purchase a 1968 Ford F250 pickup for the amount of $795.75, in violation of C.R.S. 1973, 12-6-118(3)(f).

The record for judicial review before the district court and the Supreme Court of Colorado consisted solely of evidence as reported in the transcript of the March 14, 1979 proceeding and exhibits to that hearing. Reference to the record of the hearing will refer to the page as (R. ____).

At the administrative hearing, Maldonado stated that he visited petitioner's car lot with his wife on October 7, 1978, because of a newspaper advertisement offering a car for sale. At that time no one was on the lot, except perhaps for mechanics working at the rear of the lot, other than Barney Denholm. Denholm advised Maldonado that the vehicle advertised had been sold but showed Maldonado a 1968 Ford pickup (R. 4-6). After negotiation, Denholm offered to sell the vehicle to Maldonado for $750 and the latter agreed to buy the vehicle for that price (R. 7). A document, titled "Buyers Order and Invoice" signed by Maldonado, as buyer, and B.H. Denholm, as manager of Michael Motors, Inc., in which Maldonado agreed to purchase the 1968 Ford pickup, for a total amount of $795.75, was admitted (Resp. Ex. 1; R. 7). There was no trade-in involved and Maldonado gave Denholm a down payment of $95.75 (R. 7). This was a Saturday and, as Maldonado lacked sufficient cash to pay in full, he informed Denholm that he would return the first day his bank was open with the balance owed and then take the vehicle. The following Tuesday Maldonado returned to the lot to pay and receive the vehicle. At that time, Denholm and Mr. Duane Michael were present. The latter informed Maldonado that he could not sell the vehicle for the price Denholm had agreed to sell and Mr. Michael asked Maldonado to pay an additional $150. Mr. Michael

agreed to return the deposit if Maldonado did not want the truck at the new price and told Maldonado that exhibit 1, the buyer's order, was not a valid contract as it was not signed by a company official (R. 8, 9). Maldonado then registered a complaint with the board (R. 10).

Maldonado testified that he thought when he and Denholm signed the buyer's order on October 7, 1978, he had purchased the vehicle and Denholm led him to believe that he had (R. 18, 19, 21). Maldonado also stated that when he visited the lot Mr. Denholm identified himself as Barney. Maldonado did not know that Denholm was not an official of Michael Motors Inc. until told by Mr. Michael the following Tuesday (R. 20, 21). Exhibits from an earlier hearing before the board involving Michael Motors, Inc. revealed that on prior occasions Mr. Denholm had also signed buyer's orders as manager (Resp. Exs. 2, 3; R. 25). Mr. Duane Michael testified that he was president of petitioner corporation and that he, his father and ex-wife were the only officers and stockholders. He stated that he purchased the 1968 truck from Sill Ter-Har Ford in a package deal on October 6, 1978, and that Sill Ter-Har listed the value of the truck at $750. The truck was not prepared for sale and it was physically placed on property behind petitioner's car lot but was not marked "Not for Sale." Mr. Michael further stated that for the past ten years he had no managers and that he approved all sales, some eighty sales per month. If absent, he called the lot and approved or disapproved such sales by phone. Denholm had not been authorized to sell the truck. On October 7, a sales contest was in progress and Denholm, in his opinion, sold the truck to finish high in the contest. Mr. Michael said that he was not present on October 7 and was not aware of the sale until the following Monday. He then found out about the sale and told Denholm to contact the purchaser and inform him that Michael could not approve the sale. On Tuesday, Michael personally told Maldonado that Denholm was not authorized to sell the truck, and that petitioner would lose money if it sold the vehicle for $750, but that he would sell the truck for another $150 which amount Maldonado refused to pay, stating that he had a

valid contract. About October 15, 1978, petitioner sold the truck for $1100. Michael had phoned the lot on October 7, but was not informed of the sale. In the past other salemen have signed as manager on buyer's orders (Resp. Exs. 5 and 6; R. 41). Other than instructions to his salesmen, Michael stated that he had taken no action to inform the public as to who could obligate Michael Motors, Inc. on a contract. Denholm had worked for Michael Motors, Inc. for two and one-half years (R. 30-55). Denholm testified that he had been in the automobile business as a salesman or manager some twenty-two years and stated that he had told Maldonado that the deal had to be approved by Mr. Michael (R. 55-67). Upon recall, Maldonado stated that when he first saw the truck it was parked in front of petitioner's lot and had a stock tape on it, but nothing marked it as a "Not for Sale" vehicle. Denholm put dealer's tags on the truck and Maldonado and his wife drove the truck around the block (R. 68, 69). Denholm did not tell him that the sale had to be approved by anyone else. Denholm said that he could get the truck on Tuesday (R. 68).

After hearing the evidence, the board found, on March 22, 1979, that Michael Motors, Inc. violated C.R.S. 1973, 12-6-118(3)(f) by intentional failure to perform a written agreement and suspended petitioner's used motor vehicle dealer's license from April 2, 1979 through April 18, 1979. Petitioner then filed an action in the District Court, Second Judicial District, State of Colorado, for judicial review of the board's final action pursuant to C.R.S. 1973, 24-4-106(4) which pertinently provides that "any party adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court . . . ." Upon judicial review, the district court affirmed the board's action (Appendix C to petitioner's petition). Petitioner appealed and the Colorado Supreme Court acted on the appeal in view of the constitutional issues raised by petitioner. The court affirmed the judgment of the district court (Appendix A to petitioner's petition).

SUMMARY OF ARGUMENT

This case falls within the long established rule of this court that the constitutionality of state legislation will not be considered by the court unless in the case presented its consideration is imperatively required. Such is not the fact here as the evidence of record reveals that Mr. Denholm, if not having actual authority, did have apparent authority and petitioner corporation cannot escape liability as it held out Denholm to the public as its agent and clothed this agent with authority to speak for petitioner corporation. The evidence of record supports the findings of the board. Petitioner corporation is liable for the acts of its agent under the doctrine of apparent authority and, under the facts, is estopped to deny the authority of its agent.

Therefore, this court should follow its established rule of declining to anticipate a question of constitutional law. Rather, the case should be decided on the facts establishing apparent authority without reaching constitutional problems.

Should the court deem it necessary to reach the constitutional issue it is submitted that petitioner has not been denied its right of access to the courts. Petitioner has had full access to the courts of the State of Colorado and apparently did not even choose to avail itself of a remedy provided in C.R.S. 1973, 24-4-106(8). The cases cited by petitioner are either distinguishable or support the position of respondent. Contrary to the assertion of petitioner, there is not an absolute freedom of contract and a contract reasonably calculated to injuriously affect public interests may be regulated. The sale of motor vehicles is a matter of public interest and regulation by the legislature under the police power is proper. The legislation regulating automobile dealers was enacted to carry out a public purpose, is limited in its application, and affects all persons similarly situated. The statute in issue does not come within the fourteenth amendment. Accordingly, the writ of certiorari should be denied.

ARGUMENT

I.

IT IS NOT NECESSARY FOR THE COURT TO DECIDE THE CONSTITUTIONAL ISSUE AS PETITIONER, AS PRINCIPAL, IS LIABLE ON THE AGREEMENT MADE IN ITS BEHALF BY ITS AGENT WHO, IF NOT HAVING ACTUAL AUTHORITY, HAD APPARENT AUTHORITY.

The evidence establishes that the written agreement in issue was entered into between Denholm, as agent for petitioner, and Maldonado, the buyer. A principal is liable to third parties on a contract entered into on the principal's behalf by an agent having apparent authority. In *White v. Brock*, 41 Colo. App. 156, 584 P.2d 1224 (1978), the court stated that a ". . . principal who entrusts an agent with the management of a business is subject to liability to third persons with whom the agent enters into transactions usual in such business, although contrary to the directions of the principal, unless the third person has notice of such directions," citing *Restatement (Second) of Agency* section 161, Comment d. Similarly, in *Bowser v. Union Co.*, 112 Colo. 373, 149 P.2d 800 (1944), the court, citing from 2C.J. 574 section 214 and 2C.J. 592 section 229, stated that "the liability of the principle is determined. . . . not merely by what was the apparent authority of the agent, but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had by his acts under the circumstances conferred upon his agent." The court, in *Zambruk v. Perlmutter*, 32 Colo. App. 276, 510 P.2d 472 (1973), citing *Bowser, supra*, stated that "it is incumbent upon the principal, who seeks to escape liability for the agent's actions, to show that the third party had knowledge, or was charged with notice, that the agent was acting beyond the scope of his authority." The cases clearly reveal that a principal is bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence, reasonably conversant with business usages and customs, are led to believe and assume that the agent has certain

authority and one may deal with the agent in reliance on such assumption. *Johnson v. Hurley*, 115 Mo. 513, 22 S.W. 492 (1893), *Trail v. Ind. Com'n., Div. of Employment Security*, 540 S.W.2d 179 (Mo. App. 1976), *Wynn v. McMahon Ford Co.*, 414 S.W.2d 330 (Mo. App. 1967), *Galemore Motor Co. Inc. v. State Farm Auto Ins. Co.*, 513 S.W.2d 161 (Mo. App. 1974).

The record reveals that Maldonado believed Denholm to have the authority to act and bind petitioner. The board as a trier of facts found that Denholm did have such authority. *Barnes v. Treece*, 15 Wash. App. 437, 549 P.2d 1152 (1976). In fact, only a few months prior to the instant transaction, Mr. Denholm entered into similar agreements, as agent for petitioner, in selling cars to other customers. In *Portland Motor Sales Co. v. Millett*, 124 Me. 329, 128 A. 694 (1925), the court held that "plaintiff is bound by the acts of its agent, who, it admits, had general authority to sell . . . . though subject to approval of its officers." Likewise, in *Jones v. C.I.T. Co.*, 64 Utah 151, 228 P. 896 (1924), the court held that a finance company, retaining legal title to automobiles, which it permitted a sales company to exhibit and sell under representations that it had title was estopped, after bankruptcy of dealer, to deny his authority to sell and assert a right to a car adversely to one who had made an initial payment and was entitled to delivery on payment of the balance. The court stated "To hold otherwise . . . would . . . open the door to fraud and sharp practice." The same is true in the instant case. No doubt, one reason the legislature enacted C.R.S. 1973, 12-6-118(3)(f) was to protect the public from sharp practices of car dealers. In the case of *Russell v. First American Mortgage Co.*, 39 Colo. App. 360, 565 P.2d 972 (1977), the court stated that "a principal who by his words or conduct has caused another reasonably to believe that the principal has authorized his agent to take that action is liable under the doctrine of apparent authority . . . ."

It is submitted that Mr. Denholm at the very least had apparent authority to act and in doing so did bind petitioner to the agreement. *Meek v. Smith*, 59 Colo. 461, 149 P. 627

(1915). Petitioner's refusal to carry out the agreement violated C.R.S. 12-6-118(3)(f). As to whether the failure was "intentional," it is significant that this is not a specific intent offense. At most, the word simply means that petitioner, acting through its employee and/or agent, purposely and knowingly, as distinguished from accidentally, refused to perform the written agreement. "To do something intentionally is to do it purposely, and not accidentally." *State v. Marshall*, 15 Ohio App. 2d 187, 239 N.E.2d 755 (1968). "Intentionally" means only "that defendant meant to do what he did. . ." *Carey v. Greyhound Lines Inc.*, 380 F. Supp. 467 (D.C. La. 1973), modified on other grounds 500 F.2d 1372 (5th Cir. 1974). In *Clark v. American Marine Corp.*, 304 F. Supp. 603 (D.C. La. 1969), the word was held to mean knowingly and voluntarily not accidentally. Similarly, in *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240 (10th Cir. 1973), the word meant deliberately and not accidentally. Mr. Michael purposely refused to carry out the agreement and his acts were "intentional" within the meaning of the statute. Petitioner asserts that it was justified in failing to honor the agreement as its president believed the agreement was not legal. Similar contentions have been made by creditors in cases involving violations of the Truth in Lending Act, 15 U.S.C.A. 1601, *et seq.*, and rejected by federal courts. *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161 (7th Cir. 1974), *McGowan v. King, Inc.*, 569 F.2d 845 (5th Cir. 1978). In *Haynes*, the court stated "That defendant mistook the law does not make its action any less intentional."

The findings of the board, affirmed by the trial court, are supported by substantial evidence. Mr. Denholm had apparent, if not actual, authority. In considering whether actual authority existed, evidence before the board revealed that Denholm and other employees had signed agreements in behalf of petitioner on prior occasions. Further, the buyer's order, resp. ex. 1, disclosed that Duane Michael notarized the odometer mileage statement on October 7, 1978 yet Mr. Michael stated that he was not present that day. Furthermore, even though the buyer's order had a place for a manager's signature, Mr. Michael stated that petitioner had

not had a manager for ten years. The weight to be given these facts were for the board's determination. Certainly, it cannot be said that the findings are not supported by substantial evidence as Mr. Denholm had apparent, if not actual authority, and this corporation cannot escape its obligation pursuant to the agreement.

Since the agreement was a binding contract, the constitutional issue need not be decided. Accordingly, the petition for writ of certiorari should be denied.

II.

PETITIONER HAS NOT BEEN DENIED ACCESS TO THE COURTS CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

As the record shows, the courts of the State of Colorado have been available and, in fact, used by petitioner to fully litigate the issues.

Petitioner's assertion that it was denied access to the courts is not correct. In fact, petitioner apparently chose not to exhaust a remedy available under C.R.S. 1973, 24-4-106(8) by not attempting to enjoin the board from conducting the March 14, 1979 hearing on the grounds that the board was proceeding beyond its constitutional jurisdiction. Hypothetical situations presented by petitioner which might possibly affect other motor vehicle dealers, discussed by petitioner on page 11 of its petition, are not before the court and should not be anticipated as suggested. The case of *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976), cited by petitioner, involved a federal civil rights action and is distinguishable.

Petitioner is of the erroneous opinion that contract rights are absolute. Clearly, a used motor vehicle dealer, licensed and regulated pursuant to legislation enacted by the legislature under its police powers, cannot contract, or in this instance, evade its contractual obligations, to the detri-

ment of the citizens of the state. In *Nebbia v. New York*, 291 U.S. 502, 78 L. Ed. 940, 54 S. Ct. 505 (1934) this court, at pages 538, 539, stated:

> The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people.

In *Nebbia*, at page 523, this court also stated:

> Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.

Numerous decisions of this court hold, as in *Nebbia, supra*, that there is no such thing as an absolute freedom of contract. The government may forbid or regulate a contract reasonably calculated to injuriously affect the public interests. *Atlantic Coast Line v. Riverside Mills*, 219 U.S. 186, 55 L. Ed. 167, 31 S. Ct. 164 (1911), *Chicago Burlington & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 55 L. Ed. 328, 31 S. Ct. 259 (1911), *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887).

In *New Motor Vehicle Board of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978), this court, citing *Nebbia, supra*, stated:

> Moreover . . . "certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned . . . statutes presenting the terms upon which those conducting certain

businesses may contract, or imposing terms if they do not enter into agreements, are within the state's competency."

Without question, the sale of motor vehicles is a matter of public interest and regulation by the legislature is proper under the police power. *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed*, 364 U.S 444, 939 (1960), *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939), *Semke v. State of Oklahoma Motor Vehicle Comm.*, 465 P.2d 441 (1970), *Beathune v. Colorado Dealer Licensing Board*, ___ Colo. ___, 601 P.2d 1386 (1979), *Trail Ridge Ford v. Dealer Board*, 190 Colo. 82, 543 P.2d 1245 (1975). Certainly, the fourteenth amendment to the Constitution was not designed to interfere with the exercise of the police power by a state for the protection of health, the prevention of fraud, and the preservation of the public morals. *Powell v. Pennsylvania*, 127 U.S. 678, 32 L. Ed. 256, 8 S. Ct. 995 (1888). Clearly, the above cited cases reveal that a used motor vehicle dealer, as petitioner, is subject to regulation under the police powers and state restrictions upon contracts or agreements to prevent injury upon the public or to prevent fraud are not prohibited by the fourteenth amendment. The statute in question was so designed and enacted. The gist of the offense is not even the validity of the contract, even though the facts in this case reveal a valid contract, but the acts of petitioner in refusing to fulfill the written promise to the buyer. The statute includes "written agreements" and is not solely related to legally enforceable contracts. Specifically, the statute pertains to promises reduced to writing. To hold otherwise would permit a dealer to make promises in a written document, known only to the dealer to be unenforceable, and then at the dealer's option accept or reject the sale. This would only encourage sharp practices on the part of unethical dealers and instill a lack of confidence in the purchasing consumer.

Even the cases cited by petitioner fail to support its contention that due process and equal protection have been denied. Rather, the cases of *Barbier v. Connolly*, 113 U.S. 27,

28 L. Ed. 923, 5 S. Ct. 357 (1885) and *Truax v. Corrigan*, 257 U.S. 312, 66 L. Ed. 254, 42 S. Ct. 124 (1921) hold, contrary to petitioner's contention, that class legislation carrying out a public purpose, which treats those under similar circumstances to the same duties and liabilities, is not prohibited. Specifically, in *Hayes v. Missouri*, 120 U.S. 68, 30 L. Ed. 578, 7 S. Ct. 350 (1887), Mr. Justice Field, who also authored the court's decision in *Barbier*, stated:

> As we said in *Barbier v. Connolly*, speaking of the Fourteenth Amendment: "Class legislation, discriminating against some and favoring others is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Likewise, the above quotation from *Barbier* was set forth by the court in *Truax v. Corrigan*, *supra*. In *Truax*, the court at 337 also stated that:

> In adjusting legislation to the need of the people of a State, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary, and that questions of proper classification are not free from difficulty . . . . Classification must be reasonable.

There is no evasion of the rule of equality when all within the class, such as car dealers, are subjected to the same duties and liabilities under similar circumstances. *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512, 29 L. Ed. 463, 6 S. Ct. 110 (1885), citing *Barbier v. Connolly*, *supra*, and *Soon Hing v. Crowley*, 113 U.S. 703, 28 L. Ed. 1145, 5 S. Ct. 730 (1865).

The cases cited above support the board's position that the challenged statue does not violate either the due process or equal protection clauses.

CONCLUSION

The petition for writ of certiorari should be denied as there is no federal question. The record reveals that the agent for petitioner had apparent, if not actual, authority to enter into the contract and did so yet petitioner refused to honor same. The supreme court of the state rightfully affirmed the trial court's action upholding the finding of the dealer board.

Petitioner's request for a writ of certiorari is based on an erroneous conclusion that a used motor vehicle dealer licensee has an absolute freedom to contract even against public interests. Even if it were necessary to decide the asserted constitutional issue, petitioner has totally failed to overcome the well recognized presumption of the constitutionality of the statute. Petitioner has not been denied access to the courts and in fact failed to exhaust all state remedies available. Certainly, the action taken against petitioner by the dealer board does not come within the fourteenth amendment as a denial of due process or equal protection. Therefore, the petition for a writ of certiorari should be denied for it is apparent from the evidence of record and the decisions of this court that issuance of the writ could result only in the affirmance of the judgment of the Supreme Court of Colorado.

WHEREFORE, respondent requests the court to enter an order denying the petition for writ of certiorari.

RESPECTFULLY SUBMITTED

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